IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-405

JAMES C. GABRIEL, *Pro Se*, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for Himself,

Plaintiff-Appellant, Pro Se,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervening Defendant-Appellee.

No. 76-443

WILLIAM R. WESSON, *Pro Se*, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se,

Joined By

JOHN CHARLES VAIANI, *Pro Se*, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for himself,

Plaintiff-Appellant, Pro Se,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION OF MISSOURI PACIFIC RAILROAD COMPANY TO AFFIRM

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INDEX

PAGE

Table of Cases

PAGE

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Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee Missouri Pacific Railroad Company (MoPac) moves that the judgment of the District Court be affirmed.

Appellants are holders of MoPac's Class B stock. The judgment appealed from (J.S., Appx. B)* affirmed an order of the Interstate Commerce Commission (Commission), pursuant to 49 U.S.C., §20a, authorizing a recapitalization plan of MoPac (1a-3a). The recapitalization provided for exchange of $850 in cash and sixteen shares of new common stock of MoPac for each share of Class B stock (J.S., A-7).

Pertinent Opinions

The Commission's report, *Missouri Pacific R. Co. Securities,* is printed in 347 I.C.C. 377 (1973). Its order denying reconsideration is printed at 6a-8a; see also 9a. The opinion of the District Court is not reported; it is printed in J.S. A-1 to A-8.

The District Court in the Eastern District of Missouri similarly affirmed the Commission's order, and dismissed the complaint of another Class B stockholder (44a-45a). Its opinion likewise is not reported; it is printed at 46a-55a.

The recapitalization authorized by the Commission resulted from the settlement of a Class B stockholders' class action. This settlement was approved by Judge Weinfeld. *Levin* v. *Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y. 1973), affd. on opinion of Judge Weinfeld below, *sub nom. Wesson* v. *Mississippi River Corporation,* 486 F. 2d 1398 (2d Cir. 1973) (see 33a-34a), *cert. den. sub nom.*

* References marked "J.S." are to the Jurisdictional Statement of appellant Wesson.

Wesson v. *Levin,* 414 U.S. 1112 (1973), rehearing denied 415 U.S. 937 (1974).

Appellants emphasize two other opinions. The first is the report of the Commission approving the 1956 reorganization plan of MoPac pursuant to Section 77 of the Bankruptcy Act. *Missouri Pac. R. Co. Reorganization,* 290 I.C.C. 477 (1954). The second held that approval of any plan of consolidation of appellee with another railroad required the assent of a majority of the holders of MoPac's Class B stock, as well as of its Class A stock. *Levin* v. *Mississippi River Corp.,* 386 U.S. 162 (1967).

Statute Involved

The pertinent portions of 49 U.S.C., §20, are set forth in Appendix 1 to this brief.

Question Presented

Have appellants sustained the burden of showing that the Commission's order is:

(a) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; or

(b) "unsupported by substantial evidence"?[1]

[1] See *Bowman Transp.* v. *Ark.-Best Freight Systems,* 419 U.S. 281, 284-285 (1974).

Statement

A. *Proceedings Prior to Southern District Court Action*

The situation resulting from MoPac's 1956 reorganization was thus summarized in the Commission's Report, 347 I.C.C., *supra,* at 379-380:

> "In 1956, MoPac was reorganized under Section 77 of the Bankruptcy Act pursuant to a plan of reorganization authorized by this Commission. *Missouri Pac. R. R. Reorganization,* 290 I.C.C. 477 (1954), approved in *In Re Missouri Pac. R. R.,* 129 F. Supp. 392 (E.D. Mo. 1955), affirmed *sub nom. Missouri Pac. R. R. 5¼% S.S.B.C.* v. *Thompson,* 225 F. 2d 761 (8th Cir. 1955), cert. denied, 350 U.S. 959 (1956). Upon reorganization, MoPac was authorized to issue two classes of stock: Class A and Class B, each share of each class being entitled to one vote. . . . 98 percent of the voting stock is held by Class A stock and 2 percent by Class B stock. Of the total shares outstanding, Mississippi River Corporation (Mississippi) owns approximately 62 percent of MoPac's Class A shares and Alleghany Corporation (Alleghany) owns approximately 53 percent of the Class B stock." (Footnote omitted)

The effect of this reorganization was thus described by Judge Weinfeld (59 F.R.D., *supra,* at 357, 358):

> "The capitalization of MoPac has been the subject of controversy and litigation for almost forty years. The Class A and Class B stockholders have been at odds over their respective rights and interests over a substantial period. • • •
>
> • • •

> "Obviously, the Class A stockholders have the power to elect MoPac's Board of Directors, as well as voting control with respect to other but not all corporate matters. On mergers, consolidations or reorganizations involving issuance of additional stock or the alteration of the rights of either class, approval by a majority of each class is required. Thus, in effect, the Class B stock has a veto power over such actions. In practical terms, the 'ingenious' solution envisaged under the 1956 reorganization created a basic conflict between the two classes, with the equity ownership principally in the B stock, but with effective operating control in the A stock.
>
> "• • • Thus the disparity of interest between the two classes of stock is further aggravated by Alleghany's majority ownership of the B stock, which gives it an independent veto power over any corporate action that requires the separate approval of the B stock."

In January 1964, MoPac filed an application with the Commission for permission to consolidate with T & P to form a new railroad (T & M). MoPac advised that it would submit the proposed plan to its stockholders on the basis of a collective, rather than a class, vote. This Court (reversing the Court of Appeals) held that the plan required "the assent of the majority of the shareholders on a separate class-vote basis." *Levin* v. *Mississippi River Corp.,* 386 U.S. 162, 170 (1967).

Appellants place great importance on some of the language in that opinion, and on comments from the Bench during the oral argument. They similarly emphasized these matters before Judge Weinfeld. He said (53 F.R.D., *supra,* at 359):

"Since a number of stockholders emphasize certain rhetorical statements in the Court's opinion,[6] it is well to bear in mind the Court's precise holding, and further its statement: 'We do not . . . reach the merits of the proposed plan. . . .'[7] The Court's ruling ended the proposed consolidation when in March 1967 MoPac and T & P abandoned their plan, but further litigation was ahead."

"6. See, *e.g., id.* at 169: 'The plan proposes to exchange four shares of stock of T & M for one share of MoPac Class B, which . . . . is like exchanging four rabbits for one horse.'"

"7. *Id.*, at 170.

This Court had made clear the limited scope of its holding, saying (386 U.S., at 170):

"We do not, of course, reach the merits of the proposed plan *which is the concern of the Commission in the first instance.* Any reference to the effect of the plan is not to be construed as in any way passing upon its merits. With reference to voting rights, we hold only that in a consolidation as proposed here, Missouri law must be applied and that §351.270 of that law requires the application of the Articles of Association of MoPac, which in turn, require the assent of the majority of the shareholders on a separate class-vote basis" (emphasis added).

This defect has been remedied in the instant recapitalization plan authorized by the Commission. Prior to submission to the Commission, it was approved by 83.4 percent of all the Class B stock, including 84.7 percent of the stock held by others than Alleghany; and by 86.5 percent of all

the Class A stock, including 95.5 percent of the stock held by others than Mississippi. 347 I.C.C., at 387-388.

B. *The Southern District Action*

In 1967 Alleghany and two individual owners of class B stock brought a class action suit against MoPac and Mississippi in the Southern District of New York, "to compel the payment of higher dividends in past and future years. Other causes of action were alleged, including charges of conspiracy by Mississippi and members of MoPac's Board of Directors to freeze out class B stockholders and allegations that certain acts of defendants were in violation of the Securities and Exchange Act, rule 10b-5 thereunder, and of defendants' common law fiduciary duty to class B stockholders" (347 I.C.C., at 380-381, fn. omitted). Judge Bryan ordered that the action be maintained as a class action on behalf of all class B stockholders (59 F.R.D., at 359; see also 56a to 59a).

As a result of pretrial discovery "as thorough as could be and all pertinent facts exposed by the litigants in preparation for a contested trial," "extended negotiations were participated in not only by the lawyers representing the parties, executive and financial officers of the corporations involved, but also by independent financial analysts and investment advisers specializing in corporate and transportation finance" (59 F.R.D., at 360). The terms of the proposed settlement are set forth in *ibid.*, at pp. 360-361, and are repeated in the opinion of the New Jersey District Court (J.S., A-7 to A-8).

The settlement was supported by Alleghany, the owner of 53% of the Class B stock, and by the other two plaintiffs, each of whom also owned a substantial number of

shares reflecting a heavy investment in the stock (59 F.R.D., at 366-367). There were eighteen objectors (including the instant appellants), who owned a total of approximately 1,167 shares,—less than 3% of the total (p. 367).

"That a comparatively small number of holders of shares reflecting a small percentage of the total outstanding oppose, as against a great majority who favor, the settlement does not relieve the Court of its function in passing upon the fairness of the proposal" (*ibid.*, note 40).

Accordingly Judge Weinfeld analyzed the proposed settlement with his usual meticulous care. He pointed out the following factors favoring approval of the settlement:

> a. "There can be little doubt that to maintain its competitive strength it is imperative that MoPac link itself with another system. Yet its efforts in this direction have been thwarted because of the disparate interests of the two classes of shareholders. . . .
>
> "• • • The elimination of the present capital structure with its built-in conflict between the two classes, which has foreclosed merger to date, will permit MoPac's officials to pursue merger prospects; it will also permit its officials to function full time in its interests and its stockholders—thousands upon thousands of hours have been devoted to litigation instead of to railroad operation" (p. 362, fn. omitted).
>
> b. "The Board of Directors anticipates that the annual dividend rate will be $5 per share [on the new common]. With the Class B stockholders receiving sixteen shares new stock for their present one share (in addition to the $850 cash), the dividend rate will be

> $80 per annum as against the current $5 per share" (p. 362; see also pp. 362-363).
>
> c. "The Court would face the question of determining what would have constituted adequate dividends *in each year* during the period from 1964 through 1971—a decision requiring consideration of numerous variables, making the likelihood of substantial recovery questionable. • • • Plaintiffs' problems are further compounded since it is doubtful that the Court would retain jurisdiction, as plaintiffs request, in order to monitor the MoPac Board's future dividend policy which, initially, is the Board's responsibility" (p. 364; see also pp. 364-365; emphasis in original).

The Court gave thorough consideration to the objectors' claim that the shares should be evaluated at book value (pp. 367-370). He concluded: "The authorities are in agreement that book value is of little significance in appraising the value of stock; that what is of prime significance is a corporation's earning potential based on past experience," citing *Ecker* v. *Western Pac. R.R.*, 318 U.S. 448, 483 (1943) and *Consolidated Rock Prods. Co.* v. *DuBois*, 312 U.S. 510, 525-526 (1941) (p. 369).

Judge Weinfeld concluded (pp. 373-374):

> "In sum, [the proposed capitalization] offers a permanent solution to the longstanding impasse between the two contending groups of stockholders—a result that cannot be achieved through successful litigation. Indeed, continued litigation may be said to be an exercise in futility since the hard core of the cause of differences between the two groups would remain and con-

tinue to plague them and MoPac. The settlement will afford MoPac the opportunity to pursue merger prospects so vital to its economic growth and existence and to permit its officials to give full time and attention to corporate affairs. Also it means the prospect of greater annual dividends to the Class B stockholders; a broader market for their shares; and the opportunity for representation on the Board of Directors."[2]

C. *The Commission Proceeding*

The Commission recognized its responsibilities under Section 20a. It said (347 I.C.C., at 408-409):

> ". . . [I]t is incumbent upon us to see that the interests of minority stockholders are protected and that the overall proposal is just and reasonable as to those stockholders. • • •
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> • • •
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> "• • • We believe that the results reached by the negotiators and the court under a high standard of fiduciary responsibility were clearly designed to serve the best interest of both classes of stockholders.

[2] In December 1973, the District Court denied a motion for reargument by Moumousis, another class B stockholder (20a). In April 1974, the District Court denied a motion for reargument by Napoleon Gabriel, another class B stockholder (19a). These orders were affirmed by the Second Circuit in December 1974 (35a-36a; see J.S. in No. 74-1171, p. 2), cert. den. 421 U.S. 915 (1975), rehearing denied *id.*, 1006 (1975); second petition for rehearing rejected by the Clerk (see Respondents' Memorandum in Opposition in No. 75-1169, p. 3). In March 1975, the District Court denied a motion by appellant Gabriel to set aside the judgment (37a), affd. by the Second Circuit in November 1975 (38a-39a); and denied as "vexatious" a motion to re-open in June 1975 (37a). Other motions for similar relief were denied in December 1975 (40a), January 1976 (41a), and February 1976 (42a), cert. den. 96 Sup. Ct. 1510 (1976), rehearing denied, *ibid.*, 2218 (1976).

> "Following the court's decision approving the settlement agreement, the plan was approved by an overwhelming majority of MoPac's stockholders, including a majority of the minority stock of each class. Notwithstanding this, we deem it necessary to determine whether the stockholders will receive fair value for what they will surrender and whether the plan is compatible with the public interest."

Accordingly, after due and timely notice to all MoPac stockholders (p. 378) five days of hearings were held (see J.S. 10) in which these appellants actively participated (pp. 397-402).

The Commission heard expert testimony from Alleghany's Financial Vice President; from MoPac's witness Benham, "a specialist in transportation, financial and railroad securities"; and from the Senior Railroad Analyst of First Boston Corporation, acting independently of the parties in the settlement agreement. All three testified that the offer of $2,450 for each share of Class B stock[3] was fair, on the basis of capitalization of MoPac's earnings. 347 I.C.C., at 390-394.

The most detailed testimony was given by Miss Benham (pp. 392-394, and Appendices IV through IX at pp. 425-430). The Commission said (p. 411):

> "Our conclusion is supported by the evidence of record, including the statistical data presented by witness Benham whose share capitalization method based upon available earnings and dividend payments over a 17-

[3] "Since the new common stock is valued at $100 a share, the share rate of 16 shares of new common for each share of class B stock plus $850 in cash results in a price of about $2,450 for each share of class B stock." (pp. 409-410).

year period form the basis for her conclusion that the exchange rate provided for in the settlement agreement for both classes of stock is reasonable. We believe that the detailed statistical data presented by witness Benham is entitled to considerable weight."

The contentions of these appellants, which are repeated in their jurisdictional statements herein, were fully considered by the Commission. 347 I.C.C., at 397-402. The Commission made the following findings:

a. "We have frequently held that railroad's earning power is the primary determinant of value and that future earnings that have a reasonable prospect of realization have an important bearing on value. See *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, 193; *Schwabacher* v. *United States, supra* [334 U.S. 182, 198, 201]. Current and historic earnings may properly be considered, and with varying degrees of emphasis, future earnings may be a reliable criterion of current worth. *Consolidated Rock Co.* v. *DuBois,* 312 U.S. 510, 526. . . . Although the settlement agreement was negotiated at arm's length, and the parties were presumably capable of determining their own best interest, it nevertheless appears that the settlement agreement though fair to all parties gave the benefit of doubt to the class B stockholders" (p. 411).

b. "Contrary to protestants' contention, the Commission's decision in *Missouri Pac. R. Co. Reorganization, supra* [290 I.C.C., 477)], approving MoPac's reorganization, does not constitute a bar to MoPac's present plan of recapitalization" (p. 414).

c. "In reaching this conclusion, we have given consideration to the negotiated agreement embracing the plan of recapitalization, the value per share of the classes A and B stock, the consideration to be paid for each share of existing stock, the evidence of the parties at the hearings, and their arguments and contentions on brief. In addition, we have given consideration to the fact that the elimination of the veto power held by class B stock will simplify MoPac's capital structure and that the conversion feature of the new preferred may result in an all-common stock structure. Moreover, the proposed plan will provide an effective means for the payment of higher dividends; it should render equity financing more feasible, more equitably distribute the voting power among the stockholders, eliminate the confusion between the position of classes A and B shareholders, and thus enable MoPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads" (pp. 408-409).

The Report concluded (p. 417):

"Accordingly, we find that the proposals for the issuance of securities are (a) for some lawful object within the corporate purposes of MoPac and are compatible with the public interest, which is necessary or appropriate for, or consistent with, the proper performance by MoPac of service to the public as a common carrier and will not impair its ability to perform that service; and (b) reasonably necessary and appropriate for such purpose. We further find that the proposed plan of recapitalization is fair and reasonable

to all parties in interest, that it is in the public interest, and that the proposed issuance of securities meets the statutory requirements of section 20a and conforms generally with the purposes and objectives of the national transportation policy declared by Congress."

ARGUMENT

The question presented by appellants is not substantial.

A. *Scope of Judicial Review of the Commission's Findings*

The District Court recognized that "[t]his court's function is limited. The decisions of independent regulatory agencies are generally sustained if within the authority of the agency's statutory power and are based upon appropriate findings which are in turn supported by substantial evidence," citing *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 618-621 (1966) and *U. S.* v. *Pierce Auto Lines*, 327 U.S. 515, 535-536 (1946) (J.S. A-4). As this Court said, in *Bowman Transp.* v. *Ark.-Best Freight System*, 419 U.S. 281, 285 (1974):

> "Under the 'arbitrary and capricious' standard the scope of review is a narrow one. A reviewing court must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.'"

This applies with special force to the Commission's finding with respect to valuation of stock in a recapitalization proposal. An exact parallel is found in the Alleghany recapitalization.

The Commission authorized Alleghany Corporation to issue 6-percent convertible preferred stock in exchange for its existing 5½-percent preferred stock. Since this authority was granted pursuant to Section 20a, the Commission made the same ultimate finding as it made here.[4] The District Court said (*Breswick & Co.* v. *United States*, 156 F. Supp. 227, 229, 230 [S.D.N.Y. 1957]):

> "Plaintiffs contend that the Commission's findings as to the fairness of the issue are inadequate and are in conflict with undisputed facts.
>
> • • •
>
> "As to these contentions of the plaintiffs, we believe that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed."

Nevertheless, the Court rendered judgment for plaintiffs because it held that, as a prerequisite to Commission approval, it would have had to find that Alleghany had properly acquired control of New York Central. This was

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[4] The Report of the Commission (F.D. No. 18,866, dated May 26, 1955) is not printed in full in the Commission Reports. It is printed in the Record on Appeal in 353 U.S. 151, at 105-123.

reversed and the case remanded for consideration by the District Court "of the only claim that was left open at this Court's prior disposition of this litigation, to-wit, whether 'the preferred stock issue as approved by the [Interstate Commerce] Commission was in violation of the Interstate Commerce Act.'" *Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. 415, 416 (1958). The District Court then dismissed the complaint, repeating its foregoing statement. *Breswick & Co.* v. *United States*, 160 F. Supp. 754, 756 (S.D. N.Y. 1958).

In analogous situations, where the Commission has fixed the exchange ratio of securities in merger proceedings, the courts have similarly affirmed orders of the Commission, where the questions raised were within the range of the expert judgment reserved to the Commission and its findings thereon satisfied the statute. *Northern Lines Merger Cases*, 396 U.S. 491, 516-520 (1970); *Fried* v. *United States*, 212 F. Supp. 886, 889-892 (S.D.N.Y. 1963); *Stott* v. *United States*, 166 F. Supp. 851, 855-859 (S.D.N.Y. 1958); *Schwabacher* v. *United States*, 104 F. Supp. 875, 882-885 (D.D.C. 1952), on remand from 334 U.S. 182.

The *Northern Lines* case is a particularly strong authority because what the Commission was valuing there were not railroad properties, but two million acres held in fee and mineral rights in another six million acres, which "lands are rich in natural resources, including coal, oil, and timber, and are important sources of income" (396 U.S., at 517). In affirming the Commission's finding as to the exchange ratio, the Court said (p. 519):

> "The Hearing Examiner's report reviewed the extensive negotiations between the parties and the modes

> by which they reached a valuation of the contribution each road's shareholders were making to New Company, concluding that there had been good-faith arm's-length bargaining and that the result of this bargaining fairly reflected each group of stockholders' contribution to New Company. The Examiner found the [protestant] Committee's contention on value to be unsupported by record evidence. . . .
>
> ". . . The Commission's Second Report rejected the Committee's arguments upon basically the same grounds given by the Hearing Examiner in his 1964 Report.
>
> ". . . The District Court ruled that the Commission's finding that the terms were just and reasonable was supported by substantial evidence."

The Court concluded (p. 520):

> ". . . [A]lthough the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met. It can hardly be argued that the bargaining parties were not capable of protecting their own interests."

In *Fried, supra*, the Court said (212 F. Supp., at 892):

> ". . . [I]t is clear that the Commission properly applied the standards of the Act in its examination of the exchange ratio and that its findings are supported by substantial evidence. Basically, what plaintiffs want this Court to do is substitute its judgment for that of

the Commission as to the importance in this context of factors which plaintiffs claim should have been given greater weight, including book value and the alleged stockholder rights. This we should not and will not do."

B. *Appellants' Contentions*

Appellants are raising the same contentions which they urged without success before the Commission, before the New Jersey District Court and before the Missouri District Court. Their contention as to the proper method of valuation of their stock was similarly found without merit by Judge Weinfeld and by the Second Circuit, and this Court denied certiorari on three occasions.

1. The Claim to Book Value of the B Stock

Appellants' first basic grievance is that (a) a "due process evaluation" of their Class B stock requires that they be paid book value therefor, which is claimed to be $9,000 per share;[5] and (b) the recapitalization deprives them of their property without just compensation because it "will result in a change in equity of Class B stockholders, reducing it from 60 to 65 percent to about 25 percent."

The Commission's answer follows (347 I.C.C., at 412-413):

> "Equity or book value is of significance only in the event of MoPac's liquidation or nationalization. . . . In view of MoPac's healthy financial condition, the possibility of either liquidation or nationalization appears remote. But, even assuming that MoPac may be

[5] The $9,000 is the balance sheet figure. Appellants contend that the real "equity value" is about $22,500, because inflation has increased the book value.

> liquidated at some future date, the chances of stockholders recovering the book value of their stock are minimal. From past experience, we note that stockholders very rarely recover book value on liquidation.
>
> • • • "The short answer to that argument [that the plan "will result in a change of the equity of class B stockholders, reducing it from 60 to 65 percent to about 25 percent"] is that class B shareholders are receiving value for value based upon recognized methods of valuation and that book or equity value has little or no significance in the evaluation of stock. What is being changed is a potential value on liquidation which as indicated above, can rarely, if ever, be realized. In short, they are being deprived of a bookkeeping entry rather than a real, tangible asset. Moreover, every recapitalization contemplates a change in the equity position of stockholders, and the law recognizes that it may be accomplished with the consent of the majority of the shareholders . . ." (citations omitted).

This conclusion was approved by the New Jersey Court (J.S. A-6), and by the Missouri Court (53a-54a). It is in accordance with the decision in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), where the Court, discussing a similar problem in connection with a merger proceeding, said (pp. 199, 201):

> "In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good.
>
> • • •

"A part of the capital dedicated to a railroad enterprise cannot withdraw itself without authorization any more than all of the capital can withdraw itself and abandon the railroad without approval."

Judge Weinfeld also dealt fully with this issue. He said (59 F.R.D., at 369-370):

"The authorities are in agreement that book value is of little significance in appraising the value of stock; that what is of prime significance is a corporation's earning potential based on past experience. The contention made by the objectors as to the change in equity between the two classes of stock is related to the book value concept. There appears to be no dispute that should the new preferred (1,864,052) shares be converted into new common, the equity position of the B stockholders would be reduced from 61½% to 25½%. The objectors and proponents differ as to the importance of the shift in equity. The terms equity and book value are essentially synonymous. They would have relevance if there were the prospect of MoPac's liquidation or a takeover of the railroads by the government. Neither liquidation nor the nationalization of the railroads of the country is an imminent likelihood. Judge Learned Hand's sage observation of the fallacy of measuring the value of shares by their book value is as sound today as when he stated it almost fifty years ago:

" 'The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious. It presupposes, first, that book values can be realized on liquidation, which is practically never

the case; and, second, that liquidation values are a measure of present values. Everyone knows that the value of shares in a commercial or manufacturing company depends chiefly on what they will earn, on which balance sheets throw little light . . .' [32] "

[32] *Borg* v. *International Silver Co.*, 11 F. 2d 147, 152 (2d Cir. 1925)."

2. The "Immutable" Contract in the 1956 Plan of Reorganization

The other basic grievance of appellants is "that the 1956 plan of reorganization created an 'immutable' contract with the class B stockholders which cannot be altered over the dissent of a single shareholder" (347 I.C.C., at 402). The Commission's answer follows (pp. 413-414):

"In *Missouri Pac. R. Co. Reorganization, supra* [290 I.C.C. 477], at 493[6] the Commission foresaw the possibility of MoPac's recapitalization and the alteration of rights of shareholders, and imposed a condition that such alteration should not occur without consent of at least the majority of the shares of each class of stock. MoPac has more than complied with this requirement. If the argument of protestants were to be accepted, corporate recapitalization could never be accomplished without the unanimous consent of all

[6] "The reorganized company may not alter the rights of holders of either class of stock, or authorize the issuance of additional shares of common stock of either class or of any other class, or of participating or convertible preferred stock, without the consent of at least a majority of the number of shares of common stock of each class at the time outstanding" (290 I.C.C., at 493).

" . . . [T]he vote of approval here exceeds the mandate of the Commission [*supra*]. It is our view that the stockholders' vote of approval of the plan complies with the applicable federal law and MoPac's Articles of Association" (347 I.C.C., at 388).

stockholders. So long as provision is made in the recapitalization plan for giving stockholders the approximate equivalent of what they are surrendering, as the plan does in the instant proceeding, the claim of an unlawful taking of property has no merit. • • • . . . [T]here is nothing in the Interstate Commerce Act or elsewhere in the law, or in the Commission's reorganization reports, which would convert the reorganization plan into 'the law of the land' or into an 'immutable contract' for all time."

The Missouri Court similarly concluded that "[t]he amendment to MoPac's Articles of Association was made in conformity to Missouri law . . . And Section 388.220, R.S. Mo. specifically authorizes modifications of the stock structure of railroad companies such as were here made" (51a-52a). The New Jersey Court accepted this interpretation of Missouri law (J.S. A-3 to A-4).

3. Appellants' Other Contentions

Appellants' other contentions were considered and found without merit by the Commission.

a. The Commission, as well as Judge Weinfeld, found "no merit in the assertion that Alleghany, in entering into the settlement agreement, somehow sold out to the Class B stockholders" (see 347 I.C.C., at 415-416; 59 F.R.D. at 371). This finding was approved by the Missouri and the New Jersey courts (54a; J.S. A-8). The Commission also found that, in the light of its report in *Alleghany Corporation—Control and Purchase*, 109 M.C.C. 333 (1970),—a case emphasized by appellants—the "elimination of Alleghany's ownership in MoPac's stock is a matter that tends to promote the public interest" (347 I.C.C. at 412).

b. Appellant Wesson contends (J.S. F-11 to F-12):

> "The MoPac stockholders vote on June 15, 1973 in this recapitalization plan was improperly taken . . . Of the 39,731 Class B shares outstanding, Alleghany owned 21,234 shares, or a majority of the shares voted. These shares were held in trust by the Franklin National Bank, and were under continuing jurisdiction of the Interstate Commerce Commission, and should not have been voted."

These shares were voted, not by Alleghany, but by SAF Co., nominee for the Trustee, Franklin National Bank (63a). The Commission, the Missouri Court,[1] and the New Jersey Court were all satisfied that a majority of all the Class B shares had been properly voted in favor of the plan (347 I.C.C., at 387-388, 409; 51a; J.S. A-3).

c. The Commission made the following finding (347 I.C.C. at 416):

> "Protestants have made numerous allegations of fraud, conspiracy and other acts of misconduct on the part of MoPac, Mississippi, and their respective officers and directors, and some have ascribed impropriety to the court which approved the settlement agreement. However, there is not one shred of evidence in the record to support any of these charges, and therefore no further investigation of any of protestants' charges is warranted on the basis of this record. We disagree with protestants' allegation that MoPac's proxy statement is misleading, or that as described by one protestant, 'a masterpiece of deception.' [sic] We have ex-

[1] MoPac is a Missouri corporation (47a).

amined the proxy statement in detail and found that it contains a full and fair disclosure of all relevant facts necessary for a reasonably prudent person to make an independent judgment. Also, the proxy form itself is clear, unambiguous and self-explanatory.[8] We find no merit in any of the protestants' allegations relating to misconduct on the part of Mo-Pac, Mississippi, or their management" (347 I.C.C., at 416).

This finding was approved by the Missouri Court (54a), and by the New Jersey Court (J.A. A-8).

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed without further briefing or oral argument.

Respectfully submitted,

LEON LEIGHTON
Attorney for Appellee
Missouri Pacific Railroad Company
6 East 45th Street
New York, New York 10017

November 1976

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[8] "Witness Wesson complained that the proxy statement sent to stockholders prior to voting on the plan was misleading, and indicated that he had made a similar complaint in writing to the Securities and Exchange Commission, his particular complaint being that the proxy statement did not fully reveal the fact that the equity of Class B stockholders would be reduced. On cross-examination, however, Mr. Wesson conceded that the Securities and Exchange Commission responded to his letter in writing and advised him that the proxy statement included all material information necessary for the exercise of prudent judgment" (347 I.C.C., at 401).

Appendix 1

49 U.S.C.

§20a. *Securities of carriers; issuance, etc.*

• • • • •

Issuance of securities; assumption of obligations; authorization

(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

• • • • •

Appendix 1

Scope of commission's authority

(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

• • • • •

Jurisdiction of commission as exclusive and plenary

(7) The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

APPENDIX

INDEX TO APPENDIX

APPENDIX

Commission Order Approving Recapitalization

SERVICE DATE
December 14, 1973

ORDER

At a session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 6th day of December, 1973.

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO., SECURITIES

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held and briefs filed, and the Division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is referred to and made a part hereof:

It appearing, That because of limitations upon the time available for decision, the Commission, Division 3, on September 7, 1973, ordered the omission of an Administrative Law Judge's initial decision and certification of the record to the Commission, Division 3, for decision;

It is ordered, That the Missouri Pacific Railroad Company be, and it is hereby authorized (1) to issue not exceeding 1,865,702 shares of no-par $5 cumulative preferred stock, each share having one vote and initially a stated value of $100 per share, and being convertible one year after the Commission's final order of approval into common stock, share for share and being callable at $100 per share on and after January 1, 1976; (2) to issue not exceeding 635,696 shares of no-par common stock, each hav-

ing one vote per share and a stated value of $6.25 per share, and (3) to reserve and subsequently issue an additional 1,865,702 shares of said common stock upon conversion of the preferred stock, upon the terms and for the purposes stated in the said report;

It is further ordered, That the application filed by the Missouri Pacific Railroad Company on April 4, 1973, as supplemented, be, and it is hereby, granted;

It is further ordered, That except as herein authorized the aforesaid stock shall not be sold, pledged, or repledged or otherwise disposed of by the Missouri Pacific Railroad Company unless or until so ordered or approved by this Commission;

It is further ordered, That the Missouri Pacific Railroad Company shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 1115.6);

It is further ordered, that nothing herein shall be construed to imply any guarantee or obligation as to said stock, or dividends or interest thereon, on the part of the United States;

It is further ordered, That the petition of Archibald Aron to reopen the proceeding, be, and it is hereby, denied;

It is further ordered, That the order of August 13, 1973, to the extent that it conflicts with the findings and conclusions reached in the said report be, and it is hereby, modified;

It is further ordered, That this order shall be effective on the date it is served, and that unless the authority granted herein is exercised within 180 days from the date hereof, it shall be of no further force and effect.

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

(SEAL)

Commission Order Denying Stay

SERVICE DATE
December 28, 1973

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 27th day of December, 1973.

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO., SECURITIES

Upon consideration of the record in the above-entitled proceeding, including the report and order of the Commission, Division 3, dated December 6, 1973, and served December 14, 1973, and the petitions of James C. Gabriel, Labelle Gillespie, and John C. Vaiani, to stay the effective date of the order of the Commission, Division 3, served December 14, 1973, and the replies thereto;

It appearing, That the said order was made effective immediately, as time was of the essence;

It further appearing, That the petitions do not set forth persuasive reasons for granting the relief requested:

It is ordered, That the petitions be and they are hereby, denied.

By the Commission, Division 3.

JOSEPH M. HARRINGTON
Acting Secretary.

(SEAL)

Commission Order Denying Stay

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

This order only denies the petitioners request for a stay of the effective date of the order served December 14, 1973. Petitions for reconsideration may be filed on or before January 14, 1974.

Commission Order Denying Reconsideration

SERVICE DATE
JANUARY 24 '74

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 23rd day of January, 1974.

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO. SECURITIES

Upon consideration of the record in the above-entitled proceeding, including (1) the report and order of the Commission, Division 3, dated December 6, 1973, and served December 14, 1973, (2) the order of the Commission, Division 3, acting as an Appellate Division, dated December 27, 1973, denying petitions for extension of the effective date of said report and order, (3) telegram-communication from applicant, filed December 26, 1973, announcing extension of the consummation date from December 31, 1973, to January 31, 1974, and (4) petitions for reconsideration of said report and order filed by James C. Gabriel, Labelle Gillespie, Rollin W. Gillespie, William R. Wesson, and John Charles Vaiani, with, in addition, the petition of James C. Gabriel including a request for reconsideration by the entire Commission and the petition of John Charles Vaiani including a request for reopening of the proceeding for further hearing.

It appearing, That petitioners in their petitions for reconsideration raise issues totally unrelated to the statutory

findings required to be made by this Commission in approving applications for authority to issue securities as provided in section 20a(2) of the Interstate Commerce Act; that some of the issues raised by petitioners deal with the legality of decisions in *Levin et al.* v. *Mississippi River Corporation, et al.,* 67 Civil 5095, dated March 19, 1973, —— Fed. Supp. —— (S.D.N.Y.) affirmed by the United States Court of Appeals for the Second Circuit in *Levin et al., and William R. Wesson* v. *Mississippi River Corporation, et al.,* on June 12, 1973, —— F. 2d —— (2d Cir. 1973), alleging that the holding of the Appellate Court was merely an indication of its high regard for the judge of the lower court rather than a full consideration of his findings; the omission of a initial report by the Administrative Law Judge is alleged to be a violation of due process, notwithstanding the provisions of the Administrative Procedures Act, 5 U.S.C. 1007; the effective date provided by the report and order of Division 3, dated December 6, 1973, is alleged to be inappropriate, without regard to the fact that all appropriate petitions by the parties filed with this Commission for extension of effective date, and, as here, petitions for reconsideration are given full consideration prior to the implementation of the proposed reorganization plan; and the reorganization plan approved by this Commission in *Missouri Pac. R. R. Reorganization,* 290 I.C.C. 477, (1954) approved in *In Re Missouri Pac. R.R.,* 129 F. Supp. 392 (E.D. Mo., 1955), affirmed sub nom. *Missouri Pac. R. R. 5¼% S.S.B.C.* v. *Thompson,* 225 F. 2d 761 (8th Cir. 1955), cert. denied, 350 U.S. 959 (1956), is alleged to contradict the authority granted here, while the proceedings are not comparable, the proposal here was a possibility considered by this Commission and provided for then;

Commission Order Denying Reconsideration

It is further appearing, That, with respect to issues that are directly related to this proceeding, petitioners reargue matters such as the proposals they consider would be an equitable plan for the proposed reorganization, matters relating to the stockholders' meeting approving the plan of reorganization as proposed by the Missouri Pacific, and matters otherwise relating to allegations of fraud, conspiracy and acts of misconduct on the part of the Missouri Pacific, Mississippi River Fuel Corp., and their officers and directors, all of which have been fully considered and discussed in the report of the Commission; and that, the petitions otherwise set forth no new material facts or arguments of any substance which were not considered by Division 3, in its said report, which would indicate that the statutory findings heretofore made are either improper or inappropriate, or which warrant (a) reconsideration of the said report and order by Division 3, (b) special reconsideration of that report and order by the entire Commission, or (c) reopening of the proceeding for further public hearing:

It is ordered, That the petitions be, and they are hereby, denied.

By the Commission, Division 3, acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

Commission Order Denying Finding of General Transportation Importance

SERVICE DATE
MARCH 4 '74

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 21st day of February, 1974.

Finance Docket No. 27346

MISSOURI PACIFIC RAILROAD CO., SECURITIES

Upon consideration of the record in the above-entitled proceeding, including the petitions of Rollin W. Gillespie and Labelle Gillespie, William P. Wesson, John C. Vaiani and James C. Gabriel seeking a finding that an issue of general transportation importance is involved; and

It appearing, That no issue of general transportation is involved in this proceeding:

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Affidavit of Leon Leighton

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action 74-471

JAMES C. GABRIEL, *Pro Se*,

Plaintiff,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

Civil Action 74-470

JOHN CHARLES VAIANI, *Pro Se*,

Plaintiff,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

Civil Action 74-469

WILLIAM R. WESSON, *Pro Se*,

Plaintiff,

—against—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

Affidavit of Leon Leighton

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

I am the attorney for intervening defendant Missouri Pacific Railroad Company (MoPac). I am personally familiar with all of the facts stated, except those stated on information and belief, in regard to all of which the source is indicated.

This affidavit is made in opposition to the cross-motions of the respective plaintiffs for an order of this Court restraining MoPac from converting the cumulative preferred stock into the new common stock, until the above-captioned actions have been determined by the Courts (including any appeals from the decision of this Court); and directing defendants United States of America and Interstate Commerce Commission to implement such stay.

In disregard of Rule 12 of this Court, the respective notices of cross-motion were not received until November 20 (Gabriel), November 21 (Wesson), and November 25 (Vaiani). Therefore this answering affidavit could not be file in compliance with the time schedule in Rule 12, and there has not been adequate time to obtain an affidavit from the one with personal knowledge of the facts set forth in ¶9, *infra*.

1. Pursuant to the order of the Interstate Commerce Commission dated December 14, 1973 whose annulment is sought by the instant proceedings, the outstanding preferred stock of MoPac can be converted share for share for common stock, at any time after December 14, 1974. Although these actions were instituted on April 4, 1974, no

application for a stay was made until recently. If a stay be granted pending possible appeals to the Supreme Court, the exchange will be delayed for a period of several months. Plaintiffs have not shown any basis for such extraordinary relief.

2. The oft-cited case of *Virginia Petroleum Job. Ass'n* v. *Federal Power Com'n*, 259 F. 2d 921, 925 (D.C. Cir. 1958),* set forth four essential factors, all of which must be satisfied by one seeking to obtain a temporary injunction against an order of an administrative agency. The two factors which plaintiffs have failed to meet are:

"(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review."

"(3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . Relief saving one claimant from irreparable injury at the expense of similar harm caused another might not qualify as the equitable judgment that a stay represents."

A. *The unlikelihood of prevailing on the merits on the appeal.*

3. The judgment and opinion of the United States District Court in the Eastern District of Missouri (the St.

* This was a *per curiam* decision by a panel consisting of Judges Miller, Bazelon and Burger. Shephard's Citations shows the frequency with which the case has been cited. It is referred to with approval in the Court's opinion in *Atchison, T. & S. F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 821 (1973).

Louis action) cogently answers each of the arguments urged by plaintiffs for annulling the Commission's order, and indicates how unlikely it is that they will prevail in this Court, or on appeal to the Supreme Court.

4. Unfortunately, the judgment of one three-judge court, dismissing a complaint seeking annulment of a Commission order, is not *res judicata* of such an action in a different three-judge court. See *New York Central Railroad Company* v. *United States*, 200 F. Supp. 944, 949-950 (S.D.N.Y. 1961)); *Kansas City Sou. Ry.* v. *U. S.*, 282 U.S. 760 (1931). However, it is submitted that the well-reasoned opinion of the St. Louis Court, concurred in by three Judges who are thoroughly familiar with Missouri law,* which is applicable here, should be persuasive in this Court.

5. While the decision of the St. Louis Court may not be *res judicata* of the issue, it is submitted that the judgment of Judge Weinfeld approving the recapitalization agreement, for the purpose of implementing which the Commission made the order here under review, is binding upon these plaintiffs because they are members of the class involved in that class action (see MoPac Brief, pp. 8-11). Judge Weinfeld's judgment was approved by the Court of Appeals in the Second Circuit** on the basis of his opinion, one hour after oral argument was completed.

* Chief Judge Webster had previously been a United States District Judge in the Eastern District of Missouri.

** The panel consisted of Chief Circuit Judge Kaufman, Circuit Judge Smith, and District Judge Bryan.

6. Plaintiffs refer to appeals presently pending in the United States Court of Appeals for the Second Circuit.

a. The first is an appeal from an order of Judge Weinfeld, moving to set aside his judgment on the ground that the action before him was not really a class action. Copy of his opinion dated April 8, 1974 is annexed as Exhibit A hereto. There, he reiterates that the action before him was a class action, pursuant to Rule 23(b)(1) and (2).*

b. The other is an appeal from Judge Weinfeld's order denying a motion to set aside his judgment, on the ground of newly discovered evidence, that evidence being that it was not known, at the time the settlement was approved, that the Alleghany stock was subject to a voting trust. Annexed as Exhibit B hereto is a copy of Judge Weinfeld's memorandum dated December 5, 1973, stating that such fact had been known to the Court, and had been referred to in his opinion.

7. Plaintiffs contend that the Commission's order should be annulled because it valued the Class B stock on the basis of capitalization of earnings, rather than on book value. This argument was considered and rejected by the St. Louis Court (Opinion, pp. 7-8), and by Judge Weinfeld

*The St. Louis Court recognized that this was a class action pursuant to the foregoing rule. They said (Opinion, p. 3): "The major relief sought was an order compelling the payment of higher past and future dividends . . . [A] settlement was agreed upon on the basis of a restructured capitalization which would, if consummated, eliminate the underlying cause of the constant stress between the Class A and Class B shareholders." The situation is thus identical to *Supreme Tribe of Ben Hur* v. *Cauble* (MoPac Brief, pp. 9-10).

(59 F.R.D., at p. 369). It follows the reasoning of *Schwabacher* v. *United States,* 334 U.S. 182 (1948). There, in a different but related context (the valuation of stock in a merger), the Court pointed out that the amount realizable on liquidation could not be accepted as a test of value, because "[a] part of the capital dedicated to a railroad enterprise cannot withdraw itself without authorization any more than all of the capital can withdraw itself and abandon the railroad without approval" (p. 201).

B. *Harm to other parties*

8. The chronology of the proceedings before the Commission is set forth in the opinion of the St. Louis Court (pp. 5-6). It will be noted that, though the Commission denied petitions to stay the effective date of its order on December 28, 1973, no action was taken by these plaintiffs for a judicial stay. The instant suit was not commenced until April 4, 1974, over two months after the plan of recapitalization was consummated on January 21st. The instant application for a stay was not made until seven and a half months after the institution of the suit.

9. I have been informed by C. J. Maurer, Secretary of MoPac, that the company's records indicate that 38,700 shares of its preferred stock were traded between January 21, 1974, the date of consummation of the recapitalization plan, and July 5th, when the preferred stock was split five for one; and that 95,800 shares were traded between that time and November 18th. (None of these shares was bought or sold by Mississippi River Corporation.) That means a total of 289,300 shares of preferred stock have been traded since the recapitalization became effective.

10. It is a fair assumption that many purchasers bought this stock in reliance on the fact that they could convert into common stock after December 14, 1974, since there was no stay of the Commission's order. If this conversion be delayed beyond the stipulated date, subsequent market conditions may substantially impair the value of the conversion operation. This would substantially harm the purchasers of the preferred stock. Conceivably, it might lead to actions for rescission on the ground of mutual mistake. While such actions would probably have little merit, it would still be a substantial detriment to the defendants in those actions.

11. Plaintiffs have not shown any justification for imposing such harm upon innocent third persons. They have been guilty of *laches* throughout. If they had been represented by attorneys the Court would not accept any excuse for this failure to make timely claim to any remedy sought. The plaintiffs are not entitled to any greater indulgence because they appeared *pro se*. They are not impecunious persons, for whom a court sometimes feels an impulse to extend its protective arm. Plaintiff Gabriel stated at the hearing before Judge Weinfeld on the fixation of counsel fees that he owned 370 shares of Class B stock. At the assigned value of $2,450 per share, that would make make a holding worth $906,500. The Commission's Report (p. 39) states that plaintiff Wesson owns a total of 99 shares which, at the foregoing figure, amounts to $242,550.

12. Indicative of the methods used by plaintiffs to harass and delay the Commission's proceedings, they served, simul-

taneously with the notice of cross-motion, motions to take the depositions of Commissioners Tuggle, Deason and MacFarland. Such depositions are not allowable, for two reasons. First, this proceeding is not *de novo* in character; the Court's function and responsibility is "exclusively that of reviewing the case upon the basis of the record actually made before the Interstate Commerce Commission at the time that the Commission made the ruling" (*Sakis* v. *United States*, 103 F. Supp. 292, 313 [D.D.C. 1952]). Secondly, "It [is] not the function of the court to probe the mental processes of the [Commission], in reaching [its] conclusions if [it] gave the hearing which the law required" (*Morgan* v. *United States*, 304 U.S. 1, 18 [1938]).

13. Of the 39,731 shares of MoPac's outstanding shares of Class B stock, 33,148 shares, or 83.4 percent, of the amount of such shares outstanding voted in favor of the recapitalization. Of the total of 14,062 shares of minority Class B stock (not owned by Alleghany), 11,905 shares, or 84.7%, voted in favor of recapitalization.

Conclusion

14. These three plaintiffs and the plaintiff in the St. Louis action had a full hearing before Judge Weinfeld and before the Commission. They have had more than their full day in court. It is submitted that the complaints should be dismissed, and the cross-motions for a stay denied. It is also respectfully submitted that, in the interests of bringing this controversy to a definitive and prompt conclusion, the Court should declare that all Class B stockholders are

bound by the judgment of Judge Weinfeld, affirmed by the Court of Appeals in the Second Circuit, in this class action, pursuant to Rule 23 (b)(1) and (2).

LEON LEIGHTON

(Sworn to November 26, 1974.)

EXHIBIT A ANNEXED TO AFFIDAVIT OF LEON LEIGHTON

67 Civil 5095

This motion is without merit. The holding and rationale of Zahn v. International Paper Co., 42 U.S.L.W. 4087 (U.S., Dec. 17, 1973), is applicable to class actions under Fed. R. Civ. P. 23(b)(3); as plaintiffs correctly point out, this suit was certified as a class action under Fed. R. Civ. P. 23(b)(1) and (2). Further, jurisdiction for this action was grounded on section 27 of the Securities Exchange Act of 1934, 15 U.S.C., section 78aa (1970), and pendent jurisdiction. *See* Levin v. Mississippi, 59 F.R.D. 353, 359-60 (S.D. N.Y. 1973). Section 27 does not require a minimum amount in controversy and *Zahn* is not applicable to suits brought thereunder. *See* Zahn v. International Paper Co., 42 U.S. L.W. 4087, 4091 n. 11 (U.S., Dec. 17, 1973). Finally, after the Supreme Court had denied certiorari in the instant case, the petitioner applied for a rehearing based on the *Zahn* case, and the petition was denied.

Dated: New York, N. Y.
April 8, 1974

/s/ EDWARD WEINFELD
United States District Judge

EXHIBIT B ANNEXED TO AFFIDAVIT OF LEON LEIGHTON

67 Civil 5095

That the Alleghany stock was subject to a voting trust was known to the Court. It was specifically referred to in the Court's opinion and also alluded to by counsel representing stockholders at the hearing on the settlement proposal and in briefs and affidavits submitted with respect thereto. In effect, this movant, who did not appear at the hearing, is seeking a reargument of the issues.

The motion is denied.

Dated: New York, N. Y.
December 5, 1973

/s/ Edward Weinfeld
United States District Judge

Supplemental Affidavit of Leon Leighton

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action 74-471

James C. Gabriel, *Pro Se*,

Plaintiff,

—against—

United States of America and
Interstate Commerce Commission,

Defendants.

Civil Action 74-470

John Charles Vaiani, *Pro Se*,

Plaintiff,

—against—

United States of America and
Interstate Commerce Commission,

Defendants.

Civil Action 74-469

William R. Wesson, *Pro Se*,

Plaintiff,

—against—

United States of America and
Interstate Commerce Commission,

Defendants.

Supplemental Affidavit of Leon Leighton

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

SUPPLEMENTAL AFFIDAVIT

LEON LEIGHTON, being duly sworn, deposes and says:

I am the attorney for intervening defendant, Missouri Pacific Railroad Company (MoPac). I am personally familiar with all of the facts stated, except those stated on information and belief, in regard to all of which the source is indicated.

This affidavit is made in order to supplement my affidavit sworn to November 26, 1974, in opposition to the cross-motions of the respective plaintiffs for an order of this Court restraining MoPac from converting the cumulative preferred stock into the new common stock, until the above-captioned actions have been determined by the Courts (including any appeals from the decision of this Court); and directing defendants United States of America and Interstate Commerce Commission to implement such stay.

A. *Harm to Other Parties*

1. My previous affidavit set forth the harm which would result to purchasers of preferred stock since the recapitalization plan became effective, if plaintiffs' motions for a temporary restraining order be granted. This affidavit sets forth additional prejudice, embodying facts which I was not able to assemble prior to the filing of the previous affidavit.

Supplemental Affidavit of Leon Leighton

2. Mississippi River Corporation (Mississippi) owned 1,158,395 shares of the old Class A stock (59 F.R.D. 353, 358). Pursuant to the approved plan of recapitalization, these shares had been converted into the same number of new cumulative preferred stock. These shares were split five for one on July 5, 1974 so that Mississippi presently owns 5,791,975 shares of preferred.

3. Mississippi had consented to the proposed recapitalization, relying on the assurance that it would be able to convert these shares into the common stock, on a one for one basis, one year after the effective date of the Commission's order approving the recapitalization plan, which embodied that option. Plaintiffs in this action and in the St. Louis action petitioned the Commission to stay the effective date of its December 14, 1973 order. On December 28, 1973 the Commission denied the petitions; and on January 23, 1974 it denied petitions for reconsideration. The plan of recapitalization was consummated on January 21, 1974 (see St. Louis opinion, p. 6).

4. Though the St. Louis suit was instituted on April 2, 1974 and the instant suits were instituted on April 4, 1974, no application was made in any action for a judicial stay until the instant motions were made on November 20, 1974. Mississippi had every right to rely on its ability to convert its prefered stock into 5,791,975 shares of common stock at any time after December 14th. It may suffer irreparable injury if this conversion privilege be indefinitely delayed.

Supplemental Affidavit of Leon Leighton

5. 715,657 shares of Class A stock were held by persons other than Mississippi (59 F.R.D., *supra,* at 358). 95.5% of these minority stockholders, or the holders of 683,452 shares, consented to the recapitalization plan (Commission Report, p. 19). These Class A shares were similarly exchanged for an equal number of cumulative preferred shares, which have since, as a result of the stock split, become 3,417,260 shares.

6. These stockholders, like Mississippi, had the right to rely on their ability to convert these shares into common stock after December 14, 1974. They likewise may suffer irreparable injury in the event that this privilege be indefinitely delayed.

7. The St. Louis Court said (p. 7):

> "[C]onsideration was given to the fact that elimination of the veto power held by the Class B stock would have the effect of simplifying the structure of MoPac stock and that the conversion feature of the new stock might result in an all-common stock structure. It was the opinion of the Commission that the proposed plan would provide an effective means for the payment of higher dividends, would render equity financing more feasible, would more equitably distribute the voting power among the stockholders, *would eliminate the confusion between Class A and B stockholders and would thereby enable MoPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads.*" (Emphasis added)

Supplemental Affidavit of Leon Leighton

8. Judge Weinfeld had similarly pointed out that "[t]he elimination of the present capital structure with its built-in conflict between the two classes, which has foreclosed merger to date, will permit MoPac's officials to pursue merger prospects; it will also permit its officials to function full time in its interests and its stockholders" (59 F.R.D., *supra,* at 362).

9. The foregoing quotations indicate that plaintiffs have failed to satisfy the third essential factor to justify a temporary injunction against an order of an administrative agency. In *Virginia Petroleum Job. Ass'n* v. *Federal Power Com'n,* 259 F. 2d 921 (D.D. Cir. 1958), the Court said (p. 925):

> "(4) Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes."

B. *The Problem of Unscrambling*

10. Plaintiffs argue that if the conversion takes place, "should the Plaintiffs become vindicated and win, then great difficulty would exist in setting aside the effects of said conversion of the preferred stock and tremendous confusion and harm to all parties will come. An egg that has been scrambled cannot then be unscrambled."

Supplemental Affidavit of Leon Leighton

11. The difficulty with this argument is that the "unscrambling" has already become impossible because of the steps taken pursuant to the recapitalization after the Commission had denied the request for a stay, and ten months prior to any application for a judicial stay.

a. MoPac has actually deposited $33,771,350 with the transfer agent. That sum represents $850 per share on the 39,731 shares of Class B stock, as required by the recapitalization. All except $1,044,650 of this amount has been actually distributed to Class B stockholders.

b. Mississippi has actually paid out $40 millions for the purchase of common stock which was tendered to it, pursuant to the terms of the recapitalization. Approximately 70% of that amount was paid to Alleghany, and the balance to a number of other Class B stockholders.

c. 3,080,160 shares of common stock have been distributed by the transfer agent to former Class B stockholders. Only 98,320 shares of such stock are still being held by it.

d. 37,900 shares of MoPac's common stock were traded on the American Stock Exchange since its listing on September 20, 1974. It would be impossible to unscramble all of these transactions.

Conclusion

For the reasons cited in the instant affidavit and in the affidavit sworn to November 26, 1974, it is respectively submitted that the complaint should be dismissed and the

Supplemental Affidavit of Leon Leighton

cross-motions for a stay denied; and that the Court should declare that all Class B stockholders are bound by the judgment of Judge Weinfeld, affirmed by the Court of Appeals in the Second Circuit, in this class action pursuant to Rule 23(b)(1) and (2).

LEON LEIGHTON

(Sworn to December 2, 1974.)

Extracts From Hearing Before District Court, December 4, 1974

—1—

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action #74-469

WILLIAM R. WESSON, *pro se,*

Plaintiff,

vs.

UNITED STATES OF AMERICA, *et al.,*

Defendant.

Civil Action #74-470

JOHN CHARLES VAIANI, *pro se,*

Plaintiff,

vs.

UNITED STATES OF AMERICA, *et al.,*

Defendant.

Civil Action #74-471

JAMES C. GABRIEL, *pro se,*

Plaintiff,

vs.

UNITED STATES OF AMERICA, *et al.,*

Defendant.

Thursday, December 4, 1974
Camden, New Jersey

Extracts from Hearing of December 4, 1974

Before the Honorables:

HON. JAMES HUNTER, III, Circuit Court Judge
HON. LAWRENCE A. WHIPPLE, Chief, USDJ
HON. CLARKSON S. FISHER, USDJ

Appearances:

WILLIAM R. WESSON, pro se, (Civ #74-469)

JOHN CHARLES VAIANI, pro se, (Civ. #74-470)

JAMES C. GABRIEL, pro se, (Civ. #74-471)

JONATHAN L. GOLDSTEIN, United States Attorney
For the Government

By: RICHARD W. HILL and RONALD L. REISNER, AUSA's

MILTON ROSENKRANZ, Esq.
For the Defendant, Missouri Pacific Railroad Company

By: LEON LEIGHTON, Esq., of Counsel (New York Bar)

—2—

DECISION

(Hearing recommenced at 3:00 pm in Open Court.)

Judge Hunter: I apologize for the delay. My fault. Me. I may or may not be able to read this properly since I left my glasses upstairs.

This is the Court's decision on the cross motion for injunctive relief against the conversion.

Extracts from Hearing of December 4, 1974

This matter was opened to the Court by the pro se plaintiffs, James C. Gabriel, John Charles Vaiani and William R. Wesson, on "cross motion" of the plaintiffs for an injunction restraining the intervening defendant, Missouri Pacific Railroad Company, and the defendants, United States of America and Interstate Commerce Commission, from "converting the cumulative preferred stock of the intervening defendant into new common stock" until this action has been determined by the Courts.

Leon Leighton appeared for the intervening defendant, Missouri Pacific Railroad Company; and Richard Hill and Ronald L. Reisner appeared for the defendants, United States of America and Interstate Commerce Commission.

The hearing commenced at 10:00 a.m., on Wednesday,

—3—

December 4, 1974, and terminated (with lunch and recess) at approximately 3:15 p.m., on the same day.

The Court heard argument from all three pro se plaintiffs, from counsel representing intervening defendant, Missouri Pacific Railroad Company, and from counsel representing the United States of America and the Interstate Commerce Commission.

In addition to the oral arguments, the Court received, filed and studied the variously labelled submissions by all parties.

Having considered the arguments and the material submitted, the Court made the following findings:

I. The pro se plaintiffs have not carried their burden with regard to the criteria laid down by this Court for the granting of equitable relief, to wit:

Extracts from Hearing of December 4, 1974

A. They have not proved that they will be irreparably injured if the relief sought herein is not granted;

B. They have not proved a reasonable probability of eventual success in these proceedings;

C. They have not shown that the equities which they

—4—

advanced outweigh, on balance, the equities advanced by the defendants;

D. In the light of the plaintiffs' concession that this proceeding is not affected with the public interest there is no necessity for the court to pass on this criteria; the concession consisting of representation by all pro se plaintiffs that the interest is strictly confined to the stockholders of this railroad company;

It is therefore Ordered that the pro se plaintiffs' cross motion for injunctive relief recited above be and the same is hereby denied.

No costs to either party.

Now, that is the decision on the cross motion. You have a deadline. This is a matter of record now with the Court Reporter, and represents the Decision of this Court. Your deadline is December 14th. I think that is the right date. So it is up to you to take whatever steps you feel have to be taken.

Now, with regard—going backwards, and I won't keep you but one second. Now, going backwards, we will sign the Order that was generated out of the November 27th meeting on discovery as submitted by the Government.

Extracts from Hearing of December 4, 1974

—5—

Mr. Hill: Thank you.

Judge Hunter: Judge Whipple has reminded me, in view of the shortness of the time, the minutes of this proceeding—and you can get a copy of what was said from the Court Reporter—shall constitute the final Order of this Court on this cross motion.

Judge Whipple: No Formal Order will be submitted.

• • • • •

Order of Second Circuit Court of Appeals Dated June 12, 1973

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twelfth day of June one thousand nine hundred and Seventy-three.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge,

HON. J. JOSEPH SMITH,
Circuit Judge,

HON. FREDERICK vP. BRYAN,
District Judge.

73-1864
73-1865

BETTY LEVIN, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, and on behalf of said corporation and ROBERT LEVASSEUR and ALLEGHANY CORPORATION,
Plaintiffs,

WILLIAM R. WESSON, a Class B Stockholder in MISSOURI PACIFIC RAILROAD COMPANY,
Plaintiff-Appellant,

—v.—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,
Defendants-Appellees.

Order of Second Circuit Court of Appeals
Dated June 12, 1973

Appeal from the United States District Court
For the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed on Judge Weinfeld's opinion below, —— F. Supp. —— (S.D.N.Y. 1973).

IRVING R. KAUFMAN
Chief Judge

J. JOSEPH SMITH
Circuit Judge

FREDERICK vP. BRYAN
District Judge

Order of Second Circuit Court of Appeals dated December 18, 1974

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of December one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY,
HON. WILLIAM H. TIMBERS,
HON. MURRAY I. GURFEIN,
Circuit Judges.

74-2172
74-2231
74-2104

BETTY LEVIN, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiff-Appellee,

—v.—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants,

MICHAEL MOUMOUSIS, NAPOLEAN C. GABRIEL, JACOB R. COHEN, JUNE COHEN,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Order of Second Circuit Court of Appeals dated December 18, 1974

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the orders and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro,
Clerk.

Order of Judge Weinfeld dated March 19, 1975

3/19/75 Petitioners Motion Is Hereby Denied.

So Ordered:

Edward Weinfeld
U.S.D.J.

Order of Judge Weinfeld dated June 3, 1975

Petitioner Gabriel's motion to re-open is hereby denied. Court finds motion vexatious and orders movant to pay $100.00 counsel fees, to be divided among opposing counsel.

So Ordered

Edward Weinfeld
U.S.D.J.

Order of Second Circuit Court of Appeals
Dated November 18, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of November one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge,

HON. ROBERT P. ANDERSON,
HON. ELLSWORTH VAN GRAAFEILAND,
Circuit Judges.

75-7241

BETTY LEVIN, ALLEGHANY CORPORATION
and ROBERT LEVASSEUR,

Plaintiffs-Appellees,

—v.—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants-Appellees,

JAMES C. GABRIEL,
Petitioner-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Order of Second Circuit Court of Appeals
dated November 18, 1975

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed.

Gabriel appeals from Judge Weinfeld's order of March 21, 1975, denying a motion to set aside the final judgment of May 2, 1973 approving the settlement of this action. Each of the arguments posed by Gabriel has been previously raised and rejected in prior proceedings before the district court, this Court, the Supreme Court, or the Interstate Commerce Commission. No new evidence is presented to justify relief from the operation of the 1973 judgment. Fed. R. Civ. P. 60(b).

Although at this time we will not act pursuant to appellees' suggestion that costs be imposed upon Gabriel under F.R.A.P. 38, further appeals of this nature in a matter already so thoroughly litigated may justify the imposition of such a sanction.

IRVING R. KAUFMAN
ROBERT P. ANDERSON
ELLSWORTH VAN GRAAFEILAND

Order of Second Circuit Court of Appeals dated December 16, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of December, one thousand nine hundred and seventy-five.

JAMES C. GABRIEL,

Appellant,

—v.—

MISSISSIPPI RIVER CORPORATION, *et al.*,

Appellees.

A motion having been made herein by Appellant pro se for an extension of time to file a petition for rehearing and/or rehearing *en banc;* stay of the mandate pending certiorari; to require joinder of the Internal Revenue Service.

UPON CONSIDERATION THEREOF, it is

ORDERED that said motion be and it hereby is denied.
DENIED.

IRVING R. KAUFMAN
Chief Judge,
ROBERT P. ANDERSON
ELLSWORTH VAN GRAAFEILAND
Circuit Judges.

Order of Second Circuit Court of Appeals dated January 7, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day of January, one thousand nine hundred and seventy-six.

JAMES C. GABRIEL,

Appellant,

—v.—

MISSISSIPPI RIVER CORPORATION, *et al.*,

Appellees.

A motion having been made herein by appellant pro se for reconsideration of order of December 10, 1975 denying motion for an extension of time to file a petition for rehearing and/or rehearing *en banc;* stay of the mandate pending certiorari and to require joinder of the I.R.S.,

UPON CONSIDERATION THEREOF, it is

ORDERED that said motion be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge,
ROBERT P. ANDERSON
ELLSWORTH VAN GRAAFEILAND
Circuit Judges.

Order of Second Circuit Court of Appeals dated February 2, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of February, one thousand nine hundred and seventy-six.

JAMES C. GABRIEL,

Appellant,

—v.—

MISSISSIPPI RIVER CORPORATION, *et al.*,

Appellees.

A motion having been made herein by Appellant pro se for reconsideration of order of January 7, 1976 denying motion for an extension of time to file a petition for rehearing and/or rehearing *en banc;* stay of the mandate pending certiorari and to require joinder of of the I.R.S.,

UPON CONSIDERATION THEREOF, it is

ORDERED that said motion be and it hereby is DENIED. This court will not consider any further motions for reconsideration in this appeal.

IRVING R. KAUFMAN
ROBERT P. ANDERSON
ELLSWORTH VAN GRAAFEILAND
Circuit Judges.

Order of Second Circuit Court of Appeals dated March 25, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of March, one thousand nine hundred and seventy-six.

BETTY LEVIN, *et al.*,

Appellees,

—v.—

MICHAEL MOUMOUSIS, *et al.*,

Appellants.

A motion having been made herein by Appellants Moumousis and Gabriel for disallowal of costs

UPON CONSIDERATION THEREOF, it is

ORDERED that said motion be and it hereby is denied.

FURTHER ORDERED that costs in amount of two hundred and fifty dollars ($250) are hereby taxed against appellants Michael Moumousis and Napolean Gabriel on the instant motion, the said costs to be paid to appellees within ten (10) days of the date of this order.

HENRY J. FRIENDLY
WILLIAM H. TIMBERS
MURRAY I. GURFEIN
Circuit Judges.

Judgment, Missouri District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 74-239-C (2)

LABELLE GILLESPIE,

Plaintiff,

—v.—

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Defendants,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervenor-Defendant.

JUDGMENT

The Court having this day filed its memorandum opinion which is hereby incorporated herein and made a part of this judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the orders of the Interstate Commerce Commission in Finance Docket No. 27346 with respect to the application of Missouri Pacific Railroad Company for authority under Section 20a of the Interstate Commerce Commission Act to issue securities in connection with a Plan of Recapitalization be and

the same are hereby affirmed and plaintiff's complaint is hereby dismissed at plaintiff's costs.

Dated this 14th day of November, 1974.

WILLIAM H. WEBSTER
Judge, U. S. Circuit Court

JOHN K. REGAN
Judge, U. S. District Court

J. K. WANGELAN
Judge, U. S. District Court

Opinion, Missouri District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 74-239-C (2)

LABELLE GILLESPIE,

Plaintiff,

vs.

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Defendants,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervenor-Defendant.

Before WEBSTER, Circuit Judge, WANGELIN and REGAN, District Judges.

REGAN, Judge

By this action heard to a three-judge court, plaintiff seeks to set aside and annul orders of the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act granting authority to the Missouri Pacific Railroad Company (MoPac) to issue securities in connection with a plan of recapitalization. Plaintiff is one of several MoPac stockholders who opposed the plan both before the Com-

misison and previously. We have jurisdiction under Sections 1336(a), 1398(a), 2284 and 2321-2325, 28 U.S.C.

The background of this controversy is set forth in detail both in the comprehensive 71 page report of the Commission and in Judge Weinfeld's opinion in *Levin* v. *Mississippi*, D. C. N. Y., 59 FRD 353. We briefly summarize.

MoPac is a Missouri corporation which was reorganized in 1956 under Section 77 of the Bankruptcy Act (Section 205, 11 U.S.C.). Upon reorganization, MoPac was authorized to issue two classes of $100 stated capital no par stock: Class A which was issued to former preferred stockholders and Class B issued to former common stockholders. Class A stock was preferentially entitled to non-cumulative dividends of not to exceed $5 per share annually. Each share of both classes was entitled to one vote. Class A stock, which constituted 98 per cent of the total stock, had operational control over the corporation (e.g., power to elect the Board of Directors), but in certain other important areas such as mergers, consolidations and reorganizations involving the issuance of additional stock or the alteration of rights of either class of stock, the separate consent of a majority of both classes was required, thus giving a majority of the numerically small number of Class B shares veto power over such matters. See *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162.

By 1963, Mississippi River Corporation (Mississippi) had acquired a majority of the Class A shares while Alleghany Corporation (Alleghany) had become the owner of a majority of the Class B shares. Thus, since 1963, Mississippi has elected MoPac's Board of Directors and Alle-

ghany exercised a veto power independent of the other Class B shareholders as to any corporate action necessitating Class B shareholder approval.

Understandably, because of MoPac's increased earnings and other factors, Class B shareholders, led by Alleghany, had become dissatisfied, to say the least, with MoPac's dividend policy of paying only $5 per share annually on Class B stock. As a result, a class and derivative action (*Levin* v. *Mississippi River Corporation,* supra) was instituted in which it was allleged, inter alia, that the defendants were parties to a conspiracy to "freeze out" Class B stockholders by various methods including the payment of unreasonably low dividends, that Mississippi had misused its majority voting power, and that defendants had breached their fiduciary duties. The major relief sought was an order compelling the payment of higher past and future dividends. The director defendants in that suit asserted that their dividend policy was justified by prudent business judgment made in good faith.

Thereafter, commencing in 1968 and continuing until the latter part of 1972, the parties to the *Levin* litigation (including Alleghany, two other minority B stockholders, Mississippi and MoPac) undertook extensive and thorough pre-trial discovery, following which a settlement was agreed upon on the basis of a restructured capitalization which would, if consummated, eliminate the underlying cause of the constant stress between Class A and Class B shareholders.

On March 19, 1973, in an exhaustive opinion, Judge Weinfeld approved the proposed settlement as fair and

reasonable, noting that "it offered a permanent solution to the long-standing impasse between the two contending groups of stockholders." 59 FRD at 373. The District Court decision was affirmed without opinion on appeal by the Second Circuit, 486 F.2d 1398, and certiorari was denied.

As summarized by Judge Weinfeld, the settlement provided for a Plan of Recapitalization and a proposed Amendment to MoPac's Articles of Association subject to its stockholders' approval to bring about the following:

> "(1) [E]ach share of Class A stock would be converted into one share of $5 cumulative preferred stock, with a liquidating preference of $100 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MoPac for $100 per share, after December 31, 1975. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;
>
> (2) each share of Class B stock would be converted into sixteen shares of new common stock and $850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MoPac of $33,771,350;
>
> (3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany—that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000; 000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac."

Thus, in addition to the required approval of the Interstate Commerce Commission for the issuance of the new shares, the recapitalization plan could not have been effected without the consent of 75 per cent of the outstanding stock of each class including a majority of the shares of each such class held by others than Mississippi and Alleghany. Substantially more than the necessary number of shares having voted in favor of the recapitalization plan, the issue before the Interstate Commerce Commission was whether it should grant its approval under Section 20a to issue the securities called for in the plan of recapitalization.

After a hearing at which all parties were accorded the right to present evidence and arguments, the Commission issued its report and order on December 14, 1973, granting MoPac's application, the order being made effective immediately in view of the deadline set forth in the settlement agreement. On December 28, 1973, the Commission denied petitions to stay the effective date of its December 14, 1973 order, and on January 23, 1974, it denied petitions for reconsideration of that order. On March 4, 1974, the Commission denied petitions seeking a finding that an issue of general transportation importance is involved. The plan of recapitalization was consummated on January 21, 1974, and this suit followed on April 2, 1974.

The amendment to MoPac's Articles of Association was made in conformity to Missouri law. MoPac's Articles of Association expressly provide that the rights of all holders of capital stock of the company are subject to change, alteration, abrogation, or repeal in any manner permitted by the laws of Missouri. And Section 388.220, R.S.Mo.,

specifically authorizes modifications of the stock structure of railroad companies such as were here made. Hence, since far more than the requisite number of shareholders of each class of stock has voted in favor of the changes, the question before the Interstate Commerce Commission on the Section 20a application was the very narrow one of whether the issuance of the new securities to effectuate the plan and amendment to the Articles of Association would be "for some lawful object within [McPac's] corporate purposes and compatible with the public interest," and would be "reasonably necessary and appropriate for such purpose."

The Commission recognized that the rights of minority stockholders are a part of the public interest, so that in determining whether the transaction was "compatible with the public interest," it was required "to see that the interests of minority stockholders are protected and that the overall proposal is just and reasonable as to those stockholders."

In reaching its conclusion that the proposed plan was in the best interest of the stockholders and the carrier and was compatible with the public interest, the Commission considered the fact that the recapitalization plan had been agreed upon after extensive arms-length bargaining between MoPac, Mississippi, and Alleghany, and approved by the court in the *Levin* case, the value per share of the Class A and Class B stock, the consideration to be paid for each share of existing stock, the evidence of the parties at the hearing, and the arguments and contentions in their briefs. In addition, consideration was given to the fact that the elimination of the veto power held by the Class B stock would have the effect of simplifying the structure of MoPac

stock and that the conversion feature of the new stock might result in the all-common stock structure. It was the opinion of the Commission that the proposed plan would provide an effective means for the payment of higher dividends, would render equity financing more feasible, would more equitably distribute the voting power among the stockholders, would eliminate the confusion between Class A and B stockholders and would thereby enable McPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads.

The principal contention of plaintiff and other minority Class B stockholders to the effect that the recapitalization plan unlawfully deprived them of a substantial portion of the full value of their Class B stock. In large part, the protestants, including plaintiff, argued that the Class B stock, at the minimum, should have been valued at "book value" ($9000 per share) if not at a higher up-dated valuation in excess of that figure.

The claim was considered at length by the Commission in light of the pertinent evidence. In rejecting "book value" as the measure of the actual value of the Class B stock, the Commission held that bookkeeping entries evidencing "book value" are of little significance in measuring the actual value of a going company such as MoPac. Instead, based on the testimony of expert witnesses, the Commission utilized the capitalized earnings method, as the result of which it held that the Class B shareholders would in fact receive "value for value." See in this connection the enlightening decision in *Levin* v. *Mississippi River Corporation,* supra, 59 FRD 1c 369ff; *Schwabacher* v. *United States,*

334 U.S. 182; and *Borg* v. *International Silver Company*, 2 Cir., 11 F.2d 147, 152.

Other contentions of plaintiff, rejected by the Commission, included: (1) that an "immutable" contract was created by the 1956 plan of reorganization which could not be altered over the dissent of a single Class B shareholder; (2) that the settlement plan approved by Judge Weinfeld has a "congenital defect" in that the *Levin* suit for dividends was "illegally" converted into a suit for recapitalization; (3) that the settlement plan was "forced" upon the Class B shareholders by "court fiat;" (4) that the proxy statement for the stockholders' meeting was false and misleading; and (5) that MoPac, Mississippi, and their respective boards' directors were guilty of conspiracy, fraud and deceit.

We agree that the Commission's findings on these issues were warranted. So, too, we find no merit to plaintiff's further assertion that Alleghany "sold out" the other Class B stockholders by entering into the settlement agreement. As the Commission noted in its report: "Alleghany as the majority owner of the Class B stock has spent considerable sums of money over the years to protect its interest. It is the party to the agreement that has the most to gain and the most to lose. Under the circumstances, there is little or no likelihood that Alleghany would agree to surrendering its stock for less than fair value. Besides all the evidence of record contraindicates that Alleghany agreed to accept less than fair value."

Our sole function in this proceeding is to determine whether the orders of the Commission are supported by substantial evidence on the whole record and do not in-

volve an error of law. *Norfolk & Western Railway Co.* v. *United States*, D. C. Mo., 316 F.Supp. 1396, 1399. In our judgment, the Commission applied correct legal standards in its consideration of the application and its ruling thereon. The evidence before the Commission, which is summarized in its report and which need not be here repeated, amply supports the order granting MoPac's application. Accordingly, judgment will be entered affirming the orders of the Commission and dismissing the complaint.

Dated this 14th day of November, 1974.

WILLIAM H. WEBSTER
Judge, U. S. Circuit Court

JOHN K. REGAN
Judge, U. S. District Court

H. KENNETH WANGELIN
Judge, U. S. District Court

A TRUE COPY OF THE ORIGINAL

Nov. 14, 1974
MARTIN A. SHAPIRO
Deputy Clerk
Nov. 18, 1974

Order of Judge Bryan

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civ. 5095

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiffs,

—against—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS MILBANK,

Defendants.

Plaintiffs Betty Levin and Alleghany Corporation having moved this Court for an order pursuant to Rule 23(c) and (d), Federal Rules of Civil Procedure, determining that this action may be maintained as a class action and directing that notice be given to the class in such manner as the Court may direct, and said motion having come on to be heard on September 24, 1968,

Now, upon the pleadings on file and the affidavits submitted on said motion, and after hearing Richard L. Bond, Esq., for plaintiff Alleghany Corporation, and Sheldon H. Elsen, Esq., for plaintiff Betty Levin, in support of said motion, and Michael M. Maney, Esq., for defendants Missouri Pacific Railroad Company, Robert H. Craft, T. C.

Davis and Thomas Milbank, in opposition to said motion, and due deliberation having been had, and

It appearing from the foregoing papers that there is no dispute that at the present time there are approximately 1,200 holders of Class B Stock of Missouri Pacific Railroad Company, that the plaintiffs presently before the Court are the owners of a majority of the outstanding Class B stock, and that this action meets the requirements of a class action under Rule 23(a), (b)(1) and (b)(2) of the Federal Rules of Civil Procedure, it is hereby

ORDERED that the motion by plaintiffs Betty Levin and Alleghany Corporation to determine that this action may be maintained as a class action be and it hereby is granted; and it is further

ORDERED that this action is determined to be a class action within the provisions of Rule 23(a), (b)(1) and (2), Federal Rules of Civil Procedure, and that the members of said class are all Class B stockholders of Missouri Pacific Railroad Company; and it is further

ORDERED that, pursuant to Rule 23(d), Federal Rules of Civil Procedure, notice of the pendency of this action substantially in the form annexed to this order be mailed to all registered holders, as of October 15, 1968, of Class B stock of the Missouri Pacific Railroad Company; and it is further

ORDERED that, within 10 days of the entry of this order, plaintiffs Betty Levin, Alleghany Corporation and Robert LeVasseur shall deliver to defendant Missouri Pacific Railroad Company a sufficient number of printed notices in

Order of Judge Bryan

envelopes for mailing to each registered holder of Class B stock of the Missouri Pacific Railroad Company, and defendant Missouri Pacific Railroad Company shall cause a copy of said notice to be mailed to each registered holder of Class B stock of the Missouri Pacific Railroad Company, as determined by the stock transfer records of said company, within 5 business days after receipt from plaintiffs of said printed notices in envelopes; and it is further

ORDERED that the reasonable expenses of said mailing shall be borne jointly and severally by the plaintiffs; and it is further

ORDERED that defendant Missouri Pacific Railroad Company shall file an affidavit of mailing with the Court promptly after the aforesaid mailing, which affidavit shall contain the name and address of each person to whom the notice was mailed; and it is further

ORDERED that any member of the class desiring to intervene in this action must, no later than December 2, 1968, give notice of intention to intervene in the manner set forth in the appended Notice, and thereafter must, no later than December 20, 1968, either obtain the consent of all parties to said intervention or serve notice of motion for leave to intervene.

Dated: New York, New York
October 9, 1968

/s/ FREDERICK vP. BRYAN
Frederick van Pelt Bryan
U.S.D.J.

Order and Final Judgment of Judge Weinfeld

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civil 5095 (EW)

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiffs,

—against—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants.

The parties to this action having submitted to the Court for its approval, pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure, a Stipulation of Settlement dated December 18, 1972; and

By Order dated December 20, 1972, the Court having directed that a hearing be held on January 25, 1973, to determine whether the terms and provisions of the Stipulation of Settlement were fair, reasonable, adequate and proper and should be approved, and to determine whether final judgment should be entered in accordance with the Stipulation of Settlement and having directed that notice of the settlement hearing be given to the MoPac stockholders in a manner specified in the order; and

Order and Final Judgment of Judge Weinfeld

Notice of the hearing having been given to the stockholders in accordance with the order of December 20, 1972, it having been mailed, on December 27, 1972, to all stockholders of record of defendant Missouri Pacific Railroad Company, as of the close of business on December 26, 1972, and it having been published in the national edition of *The Wall Street Journal* on December 27, 1972; and

On January 25, 1973, a hearing having been held to determine whether the proposed settlement embodied in the terms and provisions of the Stipulation of Settlement should be approved and at that hearing an opportunity having been provided for all proponents of and objectors to the proposed settlement to be heard and to submit papers for the consideration of the Court; and

The Court having considered the prior proceedings in this action, and the matters submitted to it, and after due deliberation having rendered an opinion on March 19, 1973, and having determined that a final judgment should be entered; it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the terms and provisions of the Stipulation of Settlement dated December 18, 1972, are fair, reasonable, adequate and proper to the Missouri Pacific Railroad Company and to the members of the class consisting of all of its Class B stockholders, and the same are hereby approved, as per the opinion of the Court dated March 19, 1973.

2. That the notice to the stockholders of the hearing was fair, adequate and sufficient and constituted compliance

Order and Final Judgment of Judge Weinfeld

with Rules 23(e) and 23.1 of the Federal Rules of Civil Procedure.

3. That any and all objections to the terms and provisions of the Stipulation of Settlement are hereby overruled.

4. That the parties to the Stipulation of Settlement are hereby authorized and directed to consummate the settlement of this action pursuant to the terms and provisions of the Stipulation of Settlement.

5. That thereupon the Complaint and Amended Complaint of Betty Levin, the Complaint and Amended Supplemental Complaint of Alleghany Corporation, and the Complaint of Robert LeVasseur are hereby dismissed as against all defendants on the merits, with prejudice and without costs to any party.

6. That the Court retains jurisdiction of all matters respecting the consummation of the settlement of this action pursuant to the Stipulation of Settlement and for the purpose of entertaining applications for attorneys' fees and expenses by counsel for plaintiffs Betty Levin and Robert LeVasseur and by plaintiff Alleghany Corporation.

Dated: New York, New York
May 2, 1973

EDWARD WEINFELD
U.S.D.J.

Judgment entered:

May 2, 1973

THOMAS E. ANDREWS
Acting Clerk

Extracts from Commission Record

a. Supplement to Application, Exhibit Item 8(b)(2), p. 2 (Voting of Proxies)

VOTING

Unless otherwise specified, proxies received by the Company will be voted "FOR" the Plan. If a stockholder has appropriately specified how the proxy is to be voted, it will be voted in accordance with such specification. A stockholder may revoke his proxy at any time before the proxy is voted.

b. Hearing Exhibit 4, p. 78
Tabulation of Votes at Special Meeting on June 15, 1973

MOPACRC Page 78

THE BOATMEN'S NATIONAL BANK
OF ST. LOUIS

	Shares voted			*Vote Instructed*	
Stockholder	*For*	*Against*	*Number*	*Shares*	*Yes* *No*
Vernon E. Ryther & Johanna Ryther JT Ten 4710 North Highway 140 Florissant Mo 63033			694	17	
Charles W. Saacke Jr 2601 Lindsey Ave N3 Louisville Ky 40206	1		695	1	√
Marily R. Saacke 253A Agawam Dr Stratford Conn 06497			696	1	
Sabatco C/O Trust Dept Southern Arizona Bank & Trust Company P. O. Box 1871 Tucson Ariz 85702	10		697	10	√
SAF Co. Franklin National Bank C/O Corporate Trust Dept 130 Pearl St New York N Y 10015	21243		698	21243	√
Samuel Salvatore 74 Kenilworth Street Waterbury Conn 06710		5	699	5	
Michael M. Sapounakis 679 W 239 St Riverdale Bronx N Y 10463		5	700	5	
Moschos P. Sapounakis 679 W 239 St Riverdale N Y 10463		5	701	5	
Paul M. Sapounakis 679 W 239 St Riverdale N Y 10463		5	702	5	